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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 626

WALKER DISTRIBUTING COMPANY, et al,
Petitioners,

vs.

LUCKY LAGER BREWING COMPANY,
Respondent.

PETITION TO REHEAR
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

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CASES CITED

Osborn v. Sinclair Refining Co.,
324 F. 2d 566 (4th Cir. 1963) 8, 9
United States v. Parke Davis & Co.,
362 U. S. 29 (1960) 5
Walker Distributing Co., et al v. Lucky
Lager Brewing Co., 323 F. 2d 1 (9th
Cir. 1963) 2, 4, C-1-22

STATUTES CITED

15 United States Code
Section 1 ..... B-1
Section 14 ..... B-1

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on July 1, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at.....F. 2d..... and is appended hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered July 1, 1966. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Does Section 1 of the Sherman Act (15 U.S.C. 1) apply where the one of the major breweries in the United States threatens to (and in fact does) deprive its independent distributors of the right to sell its products if they do not co-operate with it in a program to keep competitive beers out of the market place?

STATEMENT

This petition, it would appear must be directed primarily to the discretion of the court. The denial of the petition for the writ on the grounds that it was not timely filed came as a distinct shock. The petitioner was unaware that such was the case. The petitioner sought advice from many sources prior to filing the petition and it was understood that since the petition was mailed within the prescribed period it was timely. Obviously, the advice was not correct. Seeking procedural advice in Twin Falls, Idaho on appeals to the Supreme Court is difficult.

For example, the Petitioner, after having sought advice on the handling of the depositions which were used to oppose the Motion for Summary judgment still has no knowledge as to whether or not these depositions were properly presented. It was finally determined that the Clerk of the Ninth Circuit would bundle them up and send them along so that if anyone wanted to see them they could. It was this confusion which, in part, caused some delay.

The Petition, however, was completed well before the 90-day period had expired. Getting it printed in final form took longer than expected. In a community of this size, it is impossible to get overnight service as it is in larger areas where experienced brief printers apparently are found.

It was believed that since this petition was mailed within the 90 days that the Supreme Court would accept it, since it has the right to extend the period for 60 days. *Title* 28, *Section* 2101, *United States Code*. This belief is obviously incorrect and application for extension should have been made pursuant to Rule 34 of the Supreme Court Rules. There was plenty of time in which to have done this, but it was believed unnecessary.

One other error was that petitioner was proceeding from an obsolete set of Supreme Court Rules. This error was not learned until a few days ago while consulting with one of the Supreme Court

Clerks. The procedure of docketing was not understood until the current set was secured.

STATE OF LAW

It seems that petitioner's procedural difficulties has left the law in a state of conflict and confusion even within the Ninth Circuit from whence this case arose. In the original case of *Walker Distributing Company et al v. Lucky Lager Brewing Company*, 323 Fed. 2d 1, the court stated that the pleadings if supported by evidence stated a claim for relief.

The Ninth Circuit in this decision extended the decision in *U. S. v. Parke Davis and Co.*, 362 U. S. (1960) to a relatively new area. It held that a manufacturer could not coerce its distributors into combining with it to help keep other competing products out of a given market area. The club wielded by the manufacturer was a franchise agreement with its distributors which could be cancelled with little or no notice.

Evidence was developed by deposition to support this new law. Among other things were statements by two company vice presidents. The one was directly from Angus McIsaac, the other was from a William Winkel, a Utah distributor relating that he had been told by a Mr. McGowen and not denied by the respondent.

"Q. Were you critical at those times of his retention of Coors beer?

"A. Critical on his retention from the standpoint that in my opinion the split personality that has to exist when a distributor handles beer, two products such as that in this particular case, why it would be detrimental to the sale of our product.

"Q. Did you ask him to dispose of Coors beer?

"A. I can't recall at any time I asked him specifically to get rid of Coors beer.

"Q. Did you ever tell Mr. Walker that you were looking for an exclusive distributor in the Twin Falls market?

"A. Yes, sir.

"Q. When was that?

"A. That was at the meeting we had in the Boise Hotel and the time, I believe, was either December in '58 or January of 1959.

"Q. The implication of that statement was that if he was to continue as a Lucky distributor he had to dispose of Coors; am I correct in that?

"A. The implication was that, yes.

"Q. To be exclusive he couldn't continue to sell Coors?

"A. The implication of exclusive was he could carry other beers that were not competitive so far as our beer was concerned in the Twin Falls Market." *Deposition*, Angus J. McIsaac, p. 120, LL. 11-25; p. 121 LL. 1-12.

"A. Well, they gave me an ultimatum to either quit selling Coors or they would take Lucky Lager away.

"Q. And you refused to quit selling Coors?

"A. That's right.

"Q. They took Lucky Lager away?

"A. That is correct.

"Q. This was not voluntary on your part?

"A. No, sir.

"Q. Now, who do you mean by 'they?' Who?

"A. Well, originally Bert McGowan came to me. He called me and says, 'Come on into my office. I want to talk to you.' So he got me in his office and he says, 'Now we will give you—' At that particular time I only had about half this territory on Lucky Lager and Fishers. No, I didn't have any Fisher; just straight Lucky Lager at that time. And when they took over the Fisher products he said, 'We will give you sum (sic) added territory, the Cedar City Territory specifically, if you will quit selling Coors, and we will allow you to take on three premium beers,

but it can't be Coors.' And I told him that would be quite a decision for me to make and I wouldn't give him an answer at that time. And then later I told him I would divide the distributorship up. Would sell Lucky Lager strictly from a Lucky Lager sales force, and Fisher. And Coors, my nephew would take over Coors if that would make him happy. And he said there, 'With the stipulation that the nephew take out a beer license in his own name and operate strictly on his own without my supervision or without my finances. So this we attempted to do. And then they brought in a new manager into the Lucky Lager Brewing Company in Salt Lake by the name of Jess Nix, and he came down with McGowan, and they talked to me again. Says, 'When are you going to quit selling Coors?' And I said, 'Well, Russell is handling the Coors end of it.' And he said, 'Baloney. You are not kidding anybody. You are still interested in it. You are not living up to our original agreement.' So he briefed Jess Nix on what had transpired. And he said, 'What is your plans?' And I said, 'Well, at this point if you're going to take Russell out of the picture or separate us—' He wouldn't let us warehouse it in the same warehouse. First he said he would, and then he decided he wouldn't. I said, 'If it's too much of a good thing, why, you had just better take your Lucky then if that is the case.' So it went on for another

three, four, five, six months, and Jess come down and wanted to know if I wouldn't change my mind and throw out Coors. And I says 'Absolutely not.' And he says, 'I don't blame you.' So it went on for maybe another three months, and he came down with a termination letter, and says, 'This is it. Coca-Cola Bottling Company of Cedar City will take over your stock in 30 days. And whatever you have left we will pay you for.' So, that is the way it happened." *Deposition*, William Winkel, p. 6, LL 13-25; p. 7; p. 8, LL. 1-15.

Mr. Winkel's testimony further emphasizes the statements of Angus McIsaac as to competing beers and it also establishes the purpose of the manufacturer's action which was to try to keep competing beers out of the market place wherever they could.

"A. Yes. The first meeting with McGowan in his office he said, 'You can take on Budweiser, Schlitz, and Miller's if you can obtain the dealership for them; however, we wouldn't want you to take on Blue Ribbon, because they have two beers that we just as soon didn't come into your territory. And they're East Side and they're Blatz.' I had contacted Budweiser and Schlitz and Miller's, and they all seemed to feel that they had the distributors they wanted at the present time, and I couldn't get any of them, and that is one reason I decided not to give up Coors.

They told me I could take on all three of them, and yet I couldn't get any of them, so it didn't mean anything. *Deposition*, William Winkel, p. 16, LL. 2-14.

Mr. Winkel discusses how this is done. There is normally a limited amount of space in coolers, display cases, etc., to display the products for sale. The distributors control to a large degree this space because of their relationship with store owners, etc., and if a company such as Lucky Lager were completely able to dictate the use of this space, new products would have a very difficult time ever getting to the public. *Deposition*, William Winkel, pp. 13-14. *See also CT* p. 10, 25 (d).

It is to be noted that the appellate knew they were doing something wrong when these demands were made, because they were always oral and made when only the company men and the distributors were present.

Thus, we can see that the Company was attempting, as did Parke Davis, to conspire and combine with its distributors to complete an illegal act. These two distributors refused to join the unlawful conspiracy.

Others were not so circumspect about the violation of the law. Mr. James Elegante was the distributor for Lucky Lager and Coors in Provo, Utah. He received the same ultimatum as Mr. Walker and Mr. Winkel. *Deposition*, James Elegante, pp. 9, 10.

However, he gave in and disposed of the Coors franchise and received in exchange the Fisher franchise which was a subsidiary of Lucky Lager. *Deposition*, James Elegante, p. 11. In exchange for his joining the conspiracy and refusing to handle competitive beers Mr. Elegante received a portion of the franchise area which had originally belonged to William Winkel, but was stripped from him because of his refusal to combine to keep Coors, Eastside and Blatz out of the market. *Deposition*, James Elegante, p. 6. The situation in Idaho was the same when the Southern Idaho Distribution Company was given Mr. Walker's territory. *Deposition*, W. A. Godfrey pp. 24, 25, 26, 52. Mr. Godfrey was not surprised at being given the territory because Mr. Walker had had the temerity to take on a competitive beer. *Deposition*, W. A. Godfrey, p. 57.

Mr. Godfrey learned his lesson well and certainly would never handle a competing product. His part in the combination is complete.

"Q. You wouldn't take Coors?

"A. I don't hardly think I would—I know I wouldn't take Coors.

"Q. Not under the circumstances, would you?

"A. No, absolutely not, I will go along with that."

Deposition, W. A. Godfrey, p. 59, LL. 24, 25; p. 60, LL. 1, 2.

Facing this evidence the Ninth Circuit in the decision from which stems this petition for writ, held that such conduct was not an unreasonable restraint. The two decisions seem utterly incapable of being reconciled.

In addition, the opinion seems in direct conflict with the Fourth Circuit. *Osborn v. Sinclair Refining Co.* 324 F. 2d 566.

The petitioner is aware that the court was already made aware of the other conflicts with other circuits.

CONTRACT COERCION

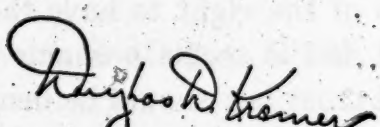
Without question great areas of industry and commerce are affected by these easily cancelled franchise agreements. It is submitted that it is an area which has not yet been fully explored by the courts but one day must be. It seems unlikely that a better case for court review could be found. It is unlikely that ever again will two separate vice presidents of a major company at different times make statements so completely outlining a policy of coercion and restraint on competing products. It seems sad from an academic standpoint that the procedural inadequacies of a country bumpkin lawyer practicing in a small town should deprive the parties of the right to have their state of facts reviewed and it seems a shame that the whole field of anti-trust law should be denied the right to have

a case so ideally suited for review decided by the Supreme Court because of human inadequacy. It may be years before a case better suited for intellectual consideration be found.

It also seems unfortunate that this case will be completed without any court ever reviewing some of the evidence. After this petition was filed, it was learned from a discussion with the Clerk that the envelopes containing the depositions of William Winkel and James Elegante had never been broken. It was known that the trial court had stated that it would be unnecessary for him to read them before entering a decision, but it was believed that the Circuit Court certainly would. Since these depositions were considered very important it was with great surprise that it was learned that they arrived at the Supreme Court still unopened. Now because of procedural problems no court will ever review the evidence submitted in this case.

CONCLUSION

It is hoped that other Justices would join with Justice Black and grant petitioner's request for the issuance of a writ. The failure to file timely is not jurisdictional. and could in the discretion of the court be granted. It is hoped that it is..



APPENDIX A

United States Court of Appeals For the Ninth Circuit

WALKER DISTRIBUTING CO., Inc., et al,
Appellant,

vs.

LUCKY LAGER BREWING CO.,
a California corporation,
Appellee.

No. 19,930

(July 1, 1966)

Appeal from the United States District Court
for the District of Idaho

Before: CHAMBERS, POPE and DUNIWAY, Circuit Judges, PER CURIAM:

This is the second appeal in this anti-trust action. The facts and applicable law are set out in our opinion rendered on the first appeal, reported at 323 F. 2d 1 (1963), and we do not repeat them here.

On the first appeal, we remanded to give appellant an opportunity to substantiate its charge that appellee had violated section 1 of the Sherman Act, 15 U.S.C. § 1, by showing (1) a contract, combination, or conspiracy among appellee and its distributors which effected a group boycott of the product of a competing manufacturer, or (2) that the appellee's semi-exclusive distributorship arrangement

was "so anti-competitive, in purpose or effect, or both, as to be an unreasonable restraint of trade." 323 F. 2d at 7-8. On remand, discovery procedures were completed and depositions submitted to the district court. Following oral argument of appellee's motion for summary judgment, that court granted appellant's request for additional time to present "affidavits or make any other showing he desired in opposition to the showing made in support of the motion." Such affidavits and further showing were not forthcoming, and the district court granted the summary judgment from which this appeal is taken. The evidence presented does not show any contract, combination, or conspiracy to effect a group boycott; still less does it show any "unreasonableness" in the restraint effected. At most, it shows a condition to dealing unilaterally laid down by appellee, and appellee's refusal to abandon that condition in various conversations between appellee and individual distributors wherein those distributors attempted to obtain relinquishment of the condition. This, as our previous opinion shows, is not enough to establish liability under section 1 of the Sherman Act.

Other contentions made by appellant were either made or could have been made on the first appeal, and need not be discussed here. *Calhoun v. Bernard*, 9 Cir., 1966, 359 F. 2d 400; *cf. Department of Fish & Game v. FPC*, 9 Cir., 1966, 359 F. 2d 165.

Affirmed.

APPENDIX B

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . 15 U.S.C., Section 1.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. 15 U.S.C., Section 14.

I hereby certify that the Petition for Rehearing is not filed for delay and is filed in good faith. I also certify that there is an intervening cause and that the matter should be heard.

KRAMER, WALKER, POPE & PLANKEY
Residing at Twin Falls, Idaho

By Douglas D. Kramer